SHUKRI BIN MOHAMAD

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
TAN SRI DATO' HJ. MOHD EUSOFF BIN CHIN CJ
TAN SRI DATO' EDGAR JOSEPH JR. FCJ
DATO' WAN ADNAN ISMAIL FCJ
[CRIMINAL APPEAL NO. 05-14-92]
9 OCTOBER 1995

DANGEROUS DRUGS: *Trafficking in Cannabis - Dangerous Drugs Act 1952 s. 39B(1)(a) - Chemist described drugs as "Cannabis as defined in the Act" without referring to s. 2(1) - Whether possible that chemist adverted to "Cannabis (Indian Hemp)" in Part III of First Schedule of the Act - Whether doubt created - Conviction under s. 39B(1)(a) - Whether sustainable - Whether accused could have committed a less serious offence under s. 12(2) of Act.*

INTERPRETATION: *Statutes - Penal provisions - Construction - Proper approach - Provisions susceptible to divergent views - Whether that in favour of accused to be adopted - Dangerous Drugs Act 1952 ss. 2(1), 11(1), 12(2) & (3), 39B(1)(a), Parts III, IV & V.*

The appellant was convicted of an offence under s. 39B(1)(a) Dangerous Drugs Act 1952, for trafficking in 36 kilogrammes of Cannabis, and was sentenced to death. The offence was alleged to have been committed sometime in 1987, and that being the case, it was imperative that the prosecution prove that the said drugs was "*Cannabis as defined in s. 2(1)*" of the Act. The facts herein showed, however, that during the trial the chemist had described the drugs as "*Cannabis as defined in the Dangerous Drugs Act 1952*" and not "*Cannabis as defined in s. 2(1)*" thereof. It was also evident that in convicting the appellant thus, the trial Judge had placed undue reliance on the testimony of the chemist.

In this appeal Counsel for the appellant argued that the conviction could not be sustained as the trial Judge was clearly wrong in relying on the evidence of the chemist. According to Counsel the omission by the chemist to mention s. 2(1) aforesaid had created a doubt as to whether the drug he was referring to was "*Cannabis*" as defined in s. 2(1) or "*Cannabis (Indian Hemp)*" as listed in Part III of the First Schedule of the Act. The existence of such doubt, it was argued, was fatal, as the appellant could have committed a non capital offence under s. 12(2).

Before the Supreme Court the primary issue that arose was whether the infirmity in the said evidence of the chemist had in fact created the alleged doubt, and if so, whether the appellant's conviction, by reason thereof, could not be allowed to stand.

Held:

Per Edgar Joseph Jr. FCJ (delivering the judgment of the Court):

[1] The glaring omission by the chemist to refer to s. 2(1) of the Act could give rise to the inference that he did not have in mind the ingredients of Cannabis as defined therein. His testimony is thus open to the construction that the plant material examined by him was either "Cannabis" within the meaning of s. 2(1) of the Act or that it was "Cannabis (Indian Hemp)" listed in Part III of the First Schedule of the Act, though nowhere defined in the Act.

[2] The testimony of the chemist had suffered from further defects when it failed to make any mention of the results of his physical examination, or whether he had carried out any tests, if at all, on the said drugs. The learned trial Judge, in his grounds of judgment, had also not recognised the infirmities in the said testimony, and nor did he make the basic finding of fact that the plant material which was the subject matter of the charge was "Cannabis" within the meaning of s. 2(1) of the Act.

[3] In the context of the relevant legislation, being found in possession, custody or control of "Cannabis (Indian Hemp)", without the necessary authorization, is an offence under s. 12(2) of the Act punishable under s. 12(3) thereof. It follows that "Cannabis" and "Cannabis (Indian Hemp)" even though of the same weight, may not be the same thing, as they may constitute the subject matter of different offences which may be differently penalised. It follows that the presumption under s. 37(da) cannot arise in the present case.

[4] Where two views can reasonably be entertained regarding the meaning and effect of provisions in a highly penal statute, that in favour of the accused should be adopted. When, therefore, as here, the Court is left in doubt as to whether the accused has committed an offence in a lower or higher degree of seriousness a finding in the lower degree should be made. This is particularly so where a finding in the higher degree will give rise to a mandatory sentence of death.

[Appeal allowed. Conviction and sentence quashed. Appellant instead convicted under s. 12(2) and sentenced to five years imprisonment].

***[Bahasa Malaysia** Translation of Headnotes]*

***DADAH BERBAHAYA :** Mengedar Kanabis - Akta Dadah Berbahaya 1952 s. 39B (1)(a) - Ahli kimia menjelaskan dadah sebagai "Kanabis sepertimana yang ditafsirkan dalam Akta" tanpa merujuk kepada s. 2(1) - Samada berkemungkinan bahawa ahli kimia merujuk kepada "Cannabis (Indian Hemp)" dalam Bahagian III Jadual Pertama Akta - Samada keraguan telah diwujudkan - Sabitan di bawah s. 39B(l)(a) - Samada boleh dipertahankan - Samada tertuduh mungkin telah melakukan kesalahan yang kurang serius di bawah s. 12(2) Akta.*

***TAFSIRAN:** Statut - Peruntukan penal - Pembentukan - Pendekatan yang wajar - Peruntukan dipengaruhi pandangan berbeda - Samada pandangan yang memihak kepada tertuduh harus diterima-pakai - Akta Dadah Berbahaya 1952 ss. 2(l), 11(1), 12(2) & (3), 39B(l)(a), Bahagian III, IV. V.*

Perayu telah disabitkan dengan kesalahan di bawah s. 39(B)(1)(a) Akta Dadah Berbahaya 1952, kerana mengedar 36 kilogram Kanabis, dan telah dihukum mati. Kesalahan itu dikatakan telah dilakukan lebih kurang dalam tahun 1987, dan oleh yang demikian, ianya adalah perlu bahawa pihak pendakwaan membuktikan bahawa dadah tersebut adalah "*Kanabis sepertimana yang ditakrifkan dalam s. 2(l)*" Akta. Fakta di sini menunjukkan, walaubagaimanapun, bahawa ketika perbicaraan, ahli kimia telah menerangkan dadah tersebut sebagai "*Kanabis sepertimana yang ditakrifkan dalam Akta Dadah Berbahaya 1952*" dan bukannya "*Kanabis sepertimana yang ditakrifkan dalam s. 2(l)*" di situ. Ianya juga jelas bahawa dalam mensabitkan perayu sedemikian, Hakim perbicaraan telah bergantung dengan tidak wajarnya pada testimoni ahli kimia.

Dalam rayuan ini Peguam bagi pihak perayu berhujah bahawa sabitan yang tersebut di atas tidak dapat dipertahankan kerana Hakim perbicaraan jelas salah dalam bergantung pada keterangan ahli kimia. Menurut Peguam, peninggalan oleh ahli kimia untuk menyebut

s. 2(1) telah mewujudkan satu keraguan samada dadah yang dirujuk olehnya adalah "*Kannabis*" sepertimana yang ditakrifkan dalam s. 2(l) atau "*Kannabis (Indian Hemp*)" sepertimana yang disenaraikan dalam Bahagian III Jadual Pertama Akta. Wujudnya keraguan yang sedemikian, telah dihujahkan, adalah fatal, kerana perayu mungkin telah melakukan kesalahan non-capital dibawah s. 12(2).

Di hadapan Mahkamah Agung, isu utama yang terbit adalah samada kelemahan dalam keterangan oleh ahli kimia itu telah mewujudkan keraguan yang dikatakan itu, dan jika demikian, samada sabitan perayu, atas sebab-sebab itu, tidak boleh dikekalkan.

Diputuskan:

Oleh Edgar Joseph Jr. HMP (menyampaikan penghakiman Mahkamah):

[1] Peninggalan jelas oleh ahli kimia untuk merujuk kepada s. 2(l) Akta tersebut boleh membangkit inferens bahawa beliau tidak terfikirkan unsur-unsur Kanabis sepertimana yang ditakrifkan di dalamnya. Testimoninya dengan itu terbuka kepada pentafsiran bahawa bahan pokok yang diperiksa oleh beliau mungkin "Kannabis" dalam maksud s. 2(l) Akta tersebut atau "Cannabis (Indian Hemp)" yang tersenarai dalam Bahagian III Jadual Pertama Akta tersebut, walaupun tidak ditakrifkan di bawahnya.

[2] Testimoni ahli kimia telah mengalami kecacatan yang seterusnya bilamana ianya gagal untuk menyebutkan keputusan pemeriksaan fisikalnya, atau samada beliau telah menjalankan apa-apa ujian, jika pun ada, keatas dadah tersebut. Tuan Hakim perbicaraan yang bijaksana, dalam alasan-alasan penghakimannya, telah juga gagal mengenal pasti kelemahan-kelemahan dalam testimoni tersebut dan beliau tidak membuat keputusan asas bahawa bahan pokok yang menjadi hal perkara tuduhan adalah "Kannabis" dalam maksud s. 2(l) Akta tersebut.

[3] Dalam konteks peruntukan undang-undang yang relevan, memiliki, menyimpan atau mengawal "Kannabis (Indian Hemp)", tanpa keizinan yang perlu, adalah satu kesalahan di bawah s. 12(2) Akta yang boleh dihukum dibawah s. 12(3) disitu. Oleh itu "Kannabis" dan "Kannabis (Indian Hemp)" walaupun mempunyai berat yang sama, mungkin tidak merupakan barang yang sama, kerana ianya boleh menjadi hal perkara kesalahan yang berbeza yang boleh dijatuhkan hukuman secara berbeza. Dengan itu juga tanggapan di bawah s. 37(da) tidak boleh berbangkit dalam kes ini.

[4] Dimana dua pendapat boleh dipertimbangkan dengan wajarnya berhubung dengan maksud dan kesan peruntukan-peruntukan dalam sesuatu statut penal, pendapat yang memihak kepada tertuduh haruslah diterima pakai. Bilamana, dengan itu, sepertimana yang terdapat di sini, Mahkamah berada dalam keraguan samada tertuduh telah melakukan kesalahan pada tahap kedudukan serius yang tinggi atau rendah, keputusan pada tahap yang lebih rendah haruslah dibuat. Ini adalah khususnya sedemikian, bilamana sesuatu keputusan pada tahap yang tinggi akan membangkitkan hukuman mati mandatori.

[Rayuan dibenarkan. Sabitan dan hukuman dibatalkan. Perayu sebaliknya disabitkan dibawah s. 12(2) dan dihukum penjara selama 5 tahun].

Cases referred to:

Public Prosecutor v. Alcontara [1993] 3 MLJ 568 ***(refd)***
Deputy Public Prosecutor v. Tan Ah Guat [1947] MLJ 32 ***(refd)***
Ho Kiat Swee v. Rex [1947] MLJ 159 ***(refd)***
Leong Bon Huat v. Public Prosecutor [1993] 3 MLJ 11 ***(refd)***
Khoo Hi Chiang v. Public Prosecutor [1994] 1 MLJ 265 ***(dist)***
Munusamy v. Public Prosecutor [1987] 1 MLJ 492 ***(dist)***

Law Society of India v. Fertilizers and Chemicals Travancore Ltd. & Ors. AIR 1994 Kerala 308 ***(refd)***

Teoh Soo Tok v. Public Prosecutor [1961] MLJ 74 ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 399

Criminal Procedure Code (Singapore), s. 427

Dangerous Drugs Act, 1952, ss. 2(l), 11(1), 12(2) & (3), 37(da), 39(B)(l)(a), 39(B)(2); Part III First Schedule

Dangerous Drugs (Amendment) Act 1992, Act A834

Other source referred to:

Maxwell on Interpretation of Statutes, 1lth Edn., pp. 254, 255

For the apellant - Karpal Singh; M/s. Karpal Singh & Company

For the public prosecutor - Azahar bin Mohamed (Yusoff bin Zainal with him) DPP

JUDGMENT

Edgar Joseph Jr. FCJ:

This appellant was convicted upon a charge that he did on 30 December 1987, at Kilometer 31, Jalan Kampong Bukit Tanah, Bukit Jawa, in the district of Pasir Puteh, in the State of Kelantan, jointly, with one Fauzi bin Ab. Rahim, traffic, in a dangerous drug, to wit 36 kilogrammes of Cannabis, in contravention of s. 39(B)(l)(a) of the Dangerous Drugs Act, 1952, ("the Act") and was sentenced to death, that being the mandatory sentence provided under s. 39(B)(2).

The Judge had, however, acquitted and discharged the accused Fauzi bin Ab. Rahim at the close of the case for the prosecution and so should have, but did not, delete the word "jointly" from the charge when calling upon the appellant to enter upon his defence. This point was not taken by Counsel for the appellant and therefore we say nothing more about it.

The petition of appeal, as amended to include additional grounds of appeal, had attacked the conviction on a number of grounds but, before us, Counsel for the appellant elected to confine his contention to only ground 3 of the additional grounds, which alleged (with some amplification) that the trial Judge was wrong in relying on the evidence of the chemist SP9, Mohan s/o Gangadharan, which evidence had created a doubt as to whether the substance he had analysed was "**Cannabis**" within the meaning of s. 2(l) of the Act, prior to its amendment on 4 September 1992 by Act A834, that is to say, the Dangerous Drugs (Amendment) Act 1992 or "**Cannabis (Indian Hemp)**", a drug listed in Part III of the First Schedule of the Act, though nowhere defined in the Act.

A scrutiny of the record provided shows that, in essence, all the chemist had said on the point at issue was that the result of his examination and analysis of the various quantities of plant material which constituted the subject matter of the charge aforesaid, showed that in each case it was "**Cannabis as defined in the Dangerous Drugs Act, 1952**". The aggregate net weight of the Cannabis being 25,664.8 grammes. The Judge's note of the evidence shows that there were repeated references by the chemist to the expression "Cannabis as defined in the DDA, 1952", with no mention made at any time of the definition section in the Act, of Cannabis, to wit, s. 2(l), which, at the material time, provided as follows:

> 'Cannabis' means any part of any plant of the genus Cannabis from which the resin has not been extracted, by whatever name it may be designated.

The glaring omission by the chemist to refer to s. 2(l) of the Act could give rise to the inference that he did not have in mind the ingredients of Cannabis as defined therein, and as explained in the Supreme Court case of *Public Prosecutor v. Alcontara* [1993] 3 MLJ 568, 577.

In *Deputy Public Prosecutor v. Tan Ah Guat* [1947] MLJ 32, arising out of a prosecution for unlawful possession of dutiable liquor under the Liquors Revenue Ordinance, an order had been made by the Magistrate that the taxi in which the alleged dutiable liquor had been found, should be restored to the respondent who was the driver of the taxi. On appeal by the Deputy Prosecutor against that order, Brown J said, *inter alia*, this:

> ... But what was fatal to the prosecution case was that the certificate (even if it had been admissible) failed to prove that the alleged samsu was 'intoxicating liquor' under the definition contained in the Ordinance. There are two ingredients of that definition:
>
> (a) That it contained more than 2% alcohol by weight;
>
> (b) That it is fit (or intended) for use as a beverage.
>
> The first was proved. The second was not. And I would observe that it is highly desirable (even though not strictly necessary) that the wording of the definition should be followed in the certificate.

Accordingly, it was held that no offence was proved to have been committed.

The certificate referred to in *Tan Ah Guat* was a certificate under s. 427 of the Singapore Criminal Procedure Code (in *pari materia* with s. 399 of our Criminal Procedure Code).

Similarly, in *Ho Kiat Swee v. Rex* [1947] MLJ 159, the accused had been prosecuted and convicted for unlawful possession of chandu, an offence under the Opium and Chandu Proclamation No. 43 of 1946. In quashing the conviction, Jobling J said this:

> The certificate in this case is an extremely unsatisfactory one. It is the only evidence for the prosecution that the article found on the accused's premises is chandu within the meaning of this term in the Opium and Chandu Proclamation No. 43 of 1946.
>
> I think it is a sufficient certificate of a chemist of the Department of Chemistry and so far complies with the provisions of the law but it does not show that the chemist who signed the certificate analysed the articles sent to him or any one of them. Further it does not show that when he refers to the articles as chandu he was aware of the technical definition of the word "chandu" in the Proclamation (paragraph 23) and was satisfied that it came within that definition.
>
> In the circumstances I take the view that the prosecution has not proved its case in the matter and my only course is to quash the conviction and the conviction is quashed accordingly."

In the present case, the testimony of the chemist also suffered from the defects that it made no mention of the results of his physical examination nor did he mention whether he had carried out any, and if so, what tests. We are thus reminded of some of the infirmities from which the testimony of the chemist in the Supreme Court case of *Leong Bon Huat v. Public Prosecutor* [1993] 3 MLJ 11 suffered which are summarised in the following passage of the judgment of the Court (at p. 14C):

> It will be seen that he made no mention of the results of his physical examination; for example, he did not say that the plant material was all of the same type and physical features as that of Cannabis, nor did he say what were the results of his microscopic examination. Did he notice any resin in the plant material? If so, in what quantity was it present? Nor did he tell the Court as to what were the tests he conducted using chemical methods; for

a example, did he resort to the Dequenois Levine test and/or the Thin Layer Chromatography test? If so, what were the results of those tests?

At this point, we must advert to the cases of *Khoo Hi Chiang v. Public Prosecutor* [1994] 1 MLJ 265, in particular the judgment of the Lord President, and *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492, upon which the prosecution laid much stress. In our view both these cases are readily distinguishable on the facts.

b In *Khoo Hi Chiang*, the charge was also for trafficking in a dangerous drug in contravention of s. 39(B)(1)(a) of the Act, but the subject matter was **42.23 kg. of raw opium**, so that there was no possibility of it being a different drug which could have constituted the subject matter of a non-capital charge, as in the present case. Futhermore, the point with which we are concerned - assuming it to have been arguable, at all - was c neither argued nor decided upon.

In *Munusamy*, the charge was for trafficking in Cannabis in contravention of s. 39(B)(1)(a) of the Act, but the testimony of the chemist did not suffer from the same infirmities to which we have directed attention in the present case. In any event, the precise point which arises for decision in the present case was never raised in argument and so did not arise acutely for decision in that case either in the High Court or in the Supreme Court.

d It follows, therefore, that neither *Khoo Hi Chiang* nor *Munusamy* is of any assistance to the prosecution.

Turning to the grounds of judgment, we note that nowhere in it is there any indication, that the Judge recognised the infirmities in the testimony of the chemist to which we have adverted nor did he even make the basic finding of fact that the plant material which e was the subject matter of the charge was "Cannabis" within the meaning of s. 2(l) of the Act. As was said, by the Court, in *Law Society of India v. Fertilizers and Chemicals Travancore Ltd. & Others AIR* 1994 Kerala 308, it must not be lost sight of that experts give evidence and do not decide the issue.

Having regard to the infirmities in the testimony of the chemist to which we have adverted, f his testimony is open to the construction that the plant material examined by him was either "Cannabis" within the meaning of s. 2(l) of the Act **or** that it was "Cannabis (Indian Hemp)" listed in Part III of the First Schedule of the Act, though nowhere defined in the Act.

We hasten to add that "Indian Hemp" was defined in s. 2 of the Dangerous Drugs Ordinance, 1952, in the form that it took prior to its deletion by the Dangerous Drugs g (Amendment) Act, 1972, as follows:

> The dried flowering or fruiting tops of the pistillate plant Cannabis Sativa L, from which the resin has not been extracted, under whatever name they may be designated in commerce,

which definition, as explained by Rigby J (as he then was) in *Teoh Soo Tok v. Public Prosecutor* [1961] MLJ 74, still affords useful guidance, as to what constitutes "Cannabis h (Indian Hemp)".

On the other hand, as we have said, "Cannabis" has been defined in s. 2(l) of the Act and later amended by Act A834, Dangerous Drugs (Amendment) Act, 1992, to read:

> any part of any plant of the genus Cannabis from which there is found to be present resin irrespective of its quantity, and by whatever name the plant may be designated,

i as explained in *Alcontara's* case.

The next question to be logically considered is whether "Cannabis" and "Cannabis (Indian Hemp)" even though of the same weight **may** be differently penalised.

Section 11(l) of the Act which comes under Part IV of the Act, bears the main heading: "CONTROL OF CERTAIN DANGEROUS DRUGS", and the sub-heading "Extent of Application of Part IV", provides:

> This Part applies to dangerous drugs listed in **Parts III**, IV and V of the First Schedule. (Emphasis supplied).

"Cannabis (Indian Hemp)" is listed, amongst other dangerous drugs in Part III of the First Schedule of the Act. Section 12(2), which comes under Part IV of the Act provides:

> No person shall have in his possession, custody or control any dangerous drug to which this Part applies unless the accused is authorised to be in possession, custody or control of such drug or is deemed to be so authorised under this Act or the regulations made thereunder.

Therefore, the inevitable conclusion is that being found in possession, custody or control of "Cannabis (Indian Hemp)", without the necessary authorisation, is an offence under s. 12(2) and therefore punishable under s. 12(3) which provides:

> Any person who contravenes the provisions of sub-section (2) or this section shall be guilty of an offence against this Act and shall be liable on conviction to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding five years or to both.

We need hardly add, that if, as we find, that in the context of the relevant legislation "Cannabis" and "Cannabis (Indian Hemp)" even though of the same weight may not be the same thing, in the sense that they may constitute the subject matter of different offences which may be differently penalised, then the presumption of trafficking under s. 37(da) of the Act cannot arise, in the present case, since it says, *inter alia*:

> any person who is found in possession of
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> (i) ...;
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> (ii) ...;
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> (iii) ...;
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> (iiia) ...;
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> (iv) ...;
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> (v) ...;
>
> (va) ...;
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> (vi) 200 grammes or more in weight of cannabis;
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> (vii) 200 grammes or more in weight of cannabis resin;
>
> (viii) a total of 200 grammes or more in weight of cannabis and cannabis resin;
>
> (ix) ...;
>
> (x) ...;
>
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

It is a familiar canon of construction that where two views can reasonably be entertained regarding the meaning and effect of provisions in a highly penal statute, and, *a fortiori*, where what is at stake is human life - that in favour of the accused should be adopted. We are supported in this by the following passage in *Maxwell on Interpretation of Statutes*, 1lth Edn., at pp. 254/255, which reads:

> But the rule of strict construction requires that the language shall be so construed that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the Enactment. Where an Enactment may entail penal consequences, no violence must be done to its language to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language.

When, therefore, as here, the Court is left in doubt as to whether the accused has committed an offence in a lower or higher degree of seriousness the Court should make a finding in the lower degree particularly where a finding in a higher degree will give rise to a mandatory sentence of death. (See *Leong Bon Huat's* case *ibid* at p. 15 E & F).

In the result, we allow the appeal, quash the conviction, set aside the sentence of death, and substitute, in lieu thereof, a conviction under s. 12(2) of the Act, and a sentence of five years imprisonment which, it will be recalled, is the maximum sentence of imprisonment provided under s. 12(3), to take effect from date of arrest.

For the avoidance of doubt, we should like to make it clear that although we have adverted to a number of infirmities both in the testimony of the chemist and the grounds of judgment of the Judge, the conviction herein has been quashed solely on ground 3 of the Additional Grounds of Appeal hereinbefore referred to. The other points to which we have referred, though substantial, are merely by way of make weight only.